Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-259

Cynthia Gillion - - - - - - Petitioner,

- VS -

People of the
State of Illinois - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, THIRD DISTRICT.

PATRICK T. MURPHY
33 North LaSalle
Suite 2300
Chicago, Illinois
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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD DISTRICT.

Petitioner, Cynthia Gillion, the mother of William and Robert Workman, the Respondents below, respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the Illinois Appellate Court, Third District entered on 31 December 1975 in IN THE INTEREST

OF WILLIAM AND ROBERT WORKMAN (No. 74-210).

O P I N I O N B E L O W

The Opinion of the Illinois Appellate Court, Third District is not yet reported officially or unofficially. A copy of that Opinion is attached as Appendix 1.

J U R I S D I C T I O N

The judgement in the Illinois Appellate Court was entered on 31 December 1975, denying the Petitioner's right to appeal her unfitness finding as being untimely filed. A Petition for Leave to Appeal was timely filed with the Supreme Court of Illinois and denied on 27 May 1976 (Appendix 2). Jurisdiction to review the final judgement and decree of the Courts of the State of Illinois is confirred upon this Court by Title 28, USC,

Sec. 1257 (3).

QUESTION PRESENTED FOR REVIEW

Whether, in a statutorily authorized judicial proceeding initiated and prosecuted by the State against an indigent parent to finally terminate all parental rights to a child, and where such a parent has an absolute statutory right to directly appeal such termination the due process and equal protection clauses require the Record to demonstrate that the parent was adequately advised of her right to appeal and, if indigent to the assistance of counsel and a free transcript on appeal?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1:

"No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

Ill. Rev. Stat., Ch. 110A, Sec. 307 (a) (6) (1971):

"An appeal may be taken to the Appellate Court from an interlocutory order of court terminating parental rights or granting, denying or revoking temporary commitment in adoption cases."

Ill. Rev. Stat., Ch. 110A, Sec. 663 (1975)

"An appeal may be taken to the Appellate Court from an order of court empowering the guardian of the person of a minor to consent to the adoption of such a minor."

Ill. Rev. Stat., Ch. 37, Sec. 705-9 (1971):

(1)"A ward of the court under this Act, with the consent of the court, may be the subject of a petition for adoption under "An Act in relation to the adoption of persons, and to repeal an Act therein named", approved July 17, 1959, as heretofore or hereafter amended, or with like consent his parent or parents may, in the manner required by such Act, surrender him for adoption to an agency legally authorized or licensed to place children for adoption."

(2)"If the petition prays and the court finds that it is in the best interests of the minor that a guardian of the person be appointed and authorized

to consent to the adoption of the minor, the court with the consent of the parents, if living, or after finding a non-consenting parent to be unfit as provided in this Section, may empower the guardian of the person of the minor, in the order appointing him as such guardian, to appear in court where any proceedings for the adoption of the minor may at any time be pending and to consent to the adoption. Such consent is sufficient to authorize the court in the adoption proceedings to enter a proper order or decree of adoption without further notice to, or consent by, the parents of the minor. An order so empowering the guardian to consent to adoption terminates parently rights, deprives the parents of the minor of all legal rights as respects the minor and relieves them of all parental responsibility for him, and frees the minor from all obligations of maintenance and obedience as respects his natural parents."

Ill. Rev. Stat., Ch. 4, Sec. 9.1-17 (1971)

"After the entry either of an order terminating parental rights or the entry of a decree of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child and shall be deprived of all legal rights as respects the child, and the child shall be free from all obligations of maintenance and obedience as respects such natural parents."

STATEMENT OF THE CASE

Unfitness Proceedings

On 23 February 1972, William and Robert Workman, Jr. were made wards of the Circuit Court of Will County, Juvenile Division because of an emergency existing in their home. (CL 4)[1] Two weeks later on the 7th of March 1972 both the Petitioner, then known as Cynthia Workman, and her husband, Robert Workman, agreed to an Order of Neglect making their sons wards of the Court. The Petitioner was later to testify that she consented to the finding of neglect because of the emotional strain she attendant to the

[1] "CL" indicates a reference to a page in the Common Law Record. "R, 24 July 1972" and "R, 5 April 1974" refer respectively to transcripts from proceedings on the two relevant court dates. "Brief" refers to a reference to a page in the Appellant's Brief. The facts as presented in that Brief were not essentially contested by the State.

divorce proceedings initiated on 13 January 1972 by her husband. (R.p. 58-62, 24 July 1972).

On 2 June 1972 the State of Illinois filed a Supplemental Petition asserting that both parents were unfit and requesting the same Juvenile Court to appoint a Guardian to consent to the adoption of each of the Petitioner's children. (CL 25). The Supplemental Petition charged the parents with "abandonment and failure to maintain a reasonable degree of interest, concern or responsibility" in violation of Ill. Rev. Stat., Ch. 4, Sec. 9.1.1 (a) (b). Attorney Lyman Tieman was appointed by the Juvenile Court to represent the Petitioner (hereinafter referred to as appointed counsel) because she was determined to be indigent. (CL 72).

On 24 July 1972, the day of the

unfitness proceedings, Robert Workman, Sr. executed his consent to adoption in open Court. He testified as the State's main witness against his former wife, the Petitioner.

Robert and Cynthia Workman were married in July, 1966 (Brief 1; R. 14, 24 July 1972).[2] In January, 1968 Robert Workman entered the Army and was sent to Viet Nam (Brief 1; R. 14, 24 July 1972).

[2] The transcripts of proceedings below were inexplicably not filed in the Illinois Appellate Court. Apparently that Court relied upon the Briefs of Counsel. For purposes of this Petition, it will become apparent that all the relevant facts are contained in the common law record. However, Petitioner will refer to the Brief and occasionally to the Record in order to demonstrate the weakness of the State's case in the Trial Court. The Petitioner will refer to facts contained in the Brief because the Appellate Court apparently did rely upon these and will refer to facts contained in the Record because the Record of the two proceedings in question were made part of the Praecipe and hence technically available to the Illinois Appellate Court.

In October, 1968 Robert Workman, Jr. was born and in August of 1969 Robert Workman, Sr. was given a hardship discharge from the Army. (Brief 1; R. 15, 16, 24 July 1972). In June, 1970 William Workman was born.

In November of 1971 Robert Workman and the Petitioner ceased living together. In January, 1972 Robert Workman, Sr. filed for divorce. (Brief 1; R. 7, 24 July 1972).

Robert Workman further testified that the Petitioner did not allow the children "to make messes and that they had to be perfect." (Brief 1; R. 6, 24 July 1972). He further stated that the Petitioner made regular meals only 3 or 4 times a week and that she worked as a waitress part time. On other days the children were fed bottles of milk and cereal (Brief 1; R. 26-28, 24 July 1972).

Workman also alleged that the children's diapers were not cleaned as regularly as they should have been and that the Petitioner received public assistance after the divorce action was filed. (Brief 2; R. 9, 24 July 1972).[3]

The Petitioner stated that at the time of the unfitness hearing she was employed at a hospital and was earning $2.73 per hour. (Brief 7; R. 50, 51, 24 July 1972). During her marriage she had held part-time waitress jobs in the evenings while her husband worked days.

[3] The following does not appear in the Brief although it does appear in the transcript of proceedings of 24 July 1972. After Robert Workman finished his testimony the Trial Court reminded him that during the divorce proceedings he had testified that his wife had committed adultry after their separation. Mr. Workman stated that he had no direct knowledge of such occurrences. The Trial Court then threatened him with a perjury action whereupon Workman's memory was refreshed and he did recall that his wife allegedly had committed adultry. (R. 30-34).

She stated that she did change diapers regularly, watched over the children, cooked meals and hired babysitters while both she and her husband were working. (Brief 7; R. 57-60, 24 July 1972). The Petitioner, between the 7th of March and 24th of July, paid a total of $10.00 per week for the case of her children. (R. 65, 24 July 1972). A social worker for Catholic Charities of Joliet testified that after the Petitioner had given up temporary custody that she had visited with the children on at least 9 occasions between 7 March 1972 and 24 July 1972. (Brief 6; R. 36, 37, 24 July 1972).

On March 28, 1973 the Court ordered that a decree be entered (which it was on 5 April 1973) that the Petitioner had abandoned and failed to maintain a reasonable degree of interest, concern, or responsibility and that she was adjudged

an unfit person and that it would be in the best interest and welfare if the children be placed for adoption. The Court terminated all residual parental rights of the Petitioner. The Court ordered the State's Attorney to prepare a decree of the matter and send a copy to all of the attorneys of Record and to the Petitioner.

According the Common Law Record (CL 93) the Court ordered that the Petitioner be advised that "this is a final and appealable order. That they have 30 days in which to file their appeal."[4] Neither

[4] In the Decree itself (CL 55) there is no statement that the Petitioner had 30 days to file an appeal and no transcripts of the 28 March proceedings were ever ordered or made part of the Praecipe However, from the Common Law Record it does appear that the Trial Court did inform the Petitioner and her attorney in open court that they had 30 days in which to file an appeal.

the Common Law Record nor the decree itself makes any inquiries about Cynthia Workman's indigency, whether she could afford to hire a lawyer for appeal, whether she could afford to purchase a transcript for the appeal, whether she could afford to pay the cost of an appeal, and whether she wished to have counsel appointed for her to prosecute the appeal.

Several months later, on 29 June 1973 the Trial Court entered an order paying $300.00 to the attorney who had been appointed to represent the Petitioner at the unfitness hearing. (CL 72).

Petition for Rehearing

On October 12, 1973, the same attorney, now, apparently acting as retained counsel, filed a Petition for Rehearing.[5] At a hearing on that Petition

[5] During cross-examination by the State's Attorney at the hearing on the Petition

held on 5 April 1974, the State's Attorney spent much of his cross-examination of the Petitioner trying to demonstrate that she still did not have enough funds adequately to care for her children. (R. 34-48, 5 April 1974). Petitioner testified that she was then earning between $400.00 and $600.00 per month, as tips and salary from her waitress job. R. 34-35, 5 April 1974). Also brought out on cross-examination was the fact that the Petitioner was paying $150.00 in rent, $85.00 payment for the loan (in part, to pay her attorney and in part to pay for a 1968 Camaro) and was spending approximately $30.00 a week on groceries, utility bills, etc. (R. 34-41, 5 April 1974).

[5](con't.) for Rehearing Mrs. Workman testified that she had taken out a loan, in part, to pay her attorney's fee for the Petition for Rehearing. (R. 41, 5 April 1974).

After the hearing on 5 April 1974, the Court denied the Petition and a Notice for Appeal was filed on 3 May 1974 appealing both the 5 April 1973 finding of unfitness and the 5 April 1974 refusal to overturn that finding. (CL 81). Illinois law (Ill. Sup. Ct. Rule 303) provides that an appeal from a finding of unfitness would have had to been filed within 30 days of its entry.

On 31 December 1975 the Illinois Appellate Court, Third District denied the Petitioner's Appeal. The Court noted that "nothing was done by the Appellant in the 30-day period following the entry of the Order nor, in fact, for over 6 months thereafter to question that judgement." p. 2 (See Appendix 1). Since there was no filing of a Notice of Appeal within thirty days of that judgement (Ill. Sup. Ct. Rule 303) the Court

held that no appeal could be maintained from the 5 April 1973 judgement of unfitness.

Treating the Petition for Rehearing (the 5 April 1974 hearing) as a Petition for Restoration of Parental Rights, two Judges of the Appellate Court did hold that this was an appealable order (the third held that it was not). However, they noted that the Trial Court was in the best position "to observe the Petitioner and to give consideration to the evidence as presented in the Trial Court. The Record itself does not clearly show that the determination of the Trial Court was contrary to the manifest weight of the evidence." p. 4 (See Appendix 1).

On appeal to the Illinois Appellate Court, the Petitioner was represented by her previously court-appointed counsel whom she apparently obtained funds to

pay for by taking out a loan. (R. 41, 5 April 1974). The constitutional question was not raised on the appeal to the Illinois Appellate Court.[6] Nevertheless, the issue is clearly of constitutional dimensions and while not raised by counsel, should have been apparent from a reading of the Common Law Record. (CL 72; 90-95). The Appellate Court could have taken note of the fact that the Petitioner was never fully advised on the Record of her appellate rights pursuant to the plain error doctrine. U.S. v. Atkinson, 297 US 157 (1936).

[6] Since Petitioner was represented by her previously court-appointed counsel, albeit by that time retained, it is apparent that counsel would not raise the question of her right to free appeal and a free transcript and to be notified of these rights on appeal since, the Record reflects that as appointed counsel, he did nothing to protect these rights and probably did not believe the Petitioner was entitled to them.

Thus the issue presented to this Court was raised for the first time by the Petitioner in the Illinois Supreme Court. That Court on 27 May 1976 refused to grant a Petition for Leave to Appeal filed by the Petitioner. (See Appendix 2).

REASONS FOR GRANTING THE WRIT

The decision below requires review because it permits the State to bring the full force of its prosecutorial power against a parent to finally deprive her of all rights and interest in her children and to arbitrarily and discriminatorily deny an indigent parent equal access to the higher courts to exercise her first appeal as a matter of right. Further, this Court is afforded the opportunity to determine whether the due process and equal protection clauses require the states to insure that indigent parents are entitled to appointment of counsel at parental termination proceedings and that the record of such a hearing affirmatively reflect that an indigent parent is fully advised of her right to seek appellate review of a final judicial termination of her parental rights and to receive necessary effective legal assistance to prosecute such appeal.

Illinois recognizes the serious loss of liberty to a parent inherent in an adjudication of child neglect or parental unfitness, by providing for the appointment of counsel Ill. Rev. Stat., Ch. 37, Sec. 701-20 (1971), if the parent or

guardian is indigent.

In the present case, the Petitioner admitted to neglect because, according to her, she was going through serious emotional problems due to the divorce action her husband had filed against her. (R. 58-62, 24 July 1972).[7] "Neglect" is defined by the Illinois Juvenile Court Act as an essentially civil matter for purposes of establishing the burden of proof upon the state, i.e., a preponderence of the evidence. Ill. Rev. Stat., Ch. 37, Sec. 702-4 (1971). Once a child has been adjudicated neglected his parents maintain some rights and responsibilities "including, but not necessarily

[7] It is not uncommon for indigent individuals to "admit" to a neglect adjudication, during emotional crises or financial difficulties in order to receive assistance for their children when the State otherwise would not provide for the family. Murphy, Our Kindly Parent - The State, Viking Press, (1974) p. 153-163.

limited to, the right to visitation, the right to consent to adoption, the right to determine the minor's religious affiliation and the responsibility for his support." Ill. Rev. Stat., Ch. 37, Sec. 701-16 (1971). However, if a child is made a ward of the Juvenile Court the State may initiate proceedings to free the child for adoption under Ill. Rev. Stat., Ch. 37, Sec. 705-9 . In such case the State must prove a non-consenting parent unfit by a clear and convincing burden of the evidence. In Re Adoption of Walepole, 5 Ill. App. 2d 362, 125 N.E. 2d 645 (1955).

The finding of unfitness leads to the appointment of a Guardian to consent to adoption and the termination of all parental rights. Ill. Rev. Stat., Ch. 37, Sec. 705-9 (1971) and Ill. Rev. Stat., Ch. 4, Sec. 9.1-17 (1971).

Illinois, like a minority of other jurisdictions,[8] mandates the appointment of counsel for a parent charged under provisions of the Illinois Juvenile Court Act with either being neglectful or unfit. Ill. Rev. Stat., Ch. 37, Sec. 701-20. Illinois provides for the appointment of counsel for indigent individuals in only a limited number of causes. Besides neglect, dependency and unfitness matters, counsel is appointed in delinquency proceedings, Ill. Rev. Stat., Ch. 37, Sec. 701-20

[8] See "Family Law-Right to Counsel-Indigent Parent-Defendants Have a Right to Court Appointed Counsel in Neglect Proceedings," 5 Texas Tech L. Rev. 857 (1974); Note,"Right to Counsel in Dependency and Neglect Proceedings," 49 Indiana L.J. 167 (1975); "Comment, Appointment of Counsel is Required For Indigent Parents Faced with Dependency - Neglect Proceedings," Rutgers-Camden L.J. 623 (1975) and cases cited therein. Of course, this case also serves as a vehicle for clarifying whether there is a constitutionally mandated right of counsel for indigent parents charged in neglect, dependency and unfitness proceedings.

(1971), in proceedings pursuant to the mental health code, Ill. Rev. Stat., Ch. 91 1/2, Sec. 9-4 (1975) and, of course, in criminal prosecutions.

All of these matters have several things in common. The State is the prosecutorial agency, the Office of State's Attorney of the County is the prosecutor and the State has its usual panoply of resources to employ against the individual citizen. In each of the above proceedings the individual being prosecuted stands to lose either his liberty or, in the case of neglect and unfitness proceedings, something often more important, his or her children.

This Court has long held that if a statute imposes punishment then the procedural safeguards required as incidents of a criminal prosecution are necessary. Kennedy v. Mendoza-Martinez,

371 US 155, 167, 168 (1963). In Mendoza-Martinez this Court outlined the test traditionally applied to determine whether an act is penal or regulatory in character:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment - retribution and deterence, whether the behavior to which it applies is already a crime. Kennedy v. Mendoza-Martinez, 372 US 144, 168, 169 and cases cited therein.

The fact that Illinois may assign the tag of "civil" to an unfitness proceeding is irrelevant in terms of whether or not the sanctions imposed are such as to require an equal amount of protections as is due the Defendant in a criminal case. As Mr. Justice Blackmun summarized in McKeiver v. Pennsylvania, 403 US 528 (1971):

> "Little, indeed is to be gained by any attempt simplistically to call the Juvenile Court Proceeding 'civil' or again 'criminal'. The Court carefully has avoided this wooden approach." at p. 541.

In unfitness proceedings, the State is the prosecuting agent, (Ill. Rev. Stat., Ch. 37, Sec. 701-21 and 705-9 (1971)), the State's Attorney of the County is the prosecuting official (Ill. Rev. Stat., Ch. 37, Sec. 701-21 (1971)) and the State has the ability to marshall its resources against the individual citizen. More importantly, the sanctions imposed, the loss of one's familial relationship to one's child, are at least as important as the loss of citizenship. Kennedy v. Mendoza-Martinez, Supra., Danford v. State Department of Health and Welfare, 303 A 2d 794 (Supreme Judicial Court of Maine, 1973):

"The fact that a parent is not fined

> or imprisoned as result of a neglect proceeding does not make the prospect of the loss of custody of one's child anything less than punishment in the eyes of the parent.---That the State's objective is not penal but directed at providing a suitable home for the child has little effect on the position of the parent. In some instances the loss of one's child may be viewed as a sanction more severe than imprisonment." Danford v. State Department of Health and Welfare, Supra., at p. 800.

In Illinois, the State Legislature, recognizing the seriousness of the sanctions imposed in neglect and unfitness proceedings, has mandated the appointment of counsel for indigent parents facing such sanctions.

Likewise, in Illinois, after a finding of unfitness and an order empowering a guardian to consent to the adoption of the minor, there is an absolute right to appeal to the Appellate Court. Ill. Sup. Ct. Rule 663. Since

such an appeal to the Appellate Court exists as a matter of right for all parents who can afford it, it was a denial of the Petitioner's rights as protected by the due process and equal protection clauses, for the Trial Court not to inquire as to her indigency and to tell of her right to some type of assistance on appeal. Griffin v. Illinois, 351 US 12 (1956); Douglas v. California, 372 US 353 (1962).

Nor in light of the sanctions imposed in the present case, should the fact that the State has attached a civil tag to unfitness proceedings prejudice the Petitioner. This Court answered in Mayer v. City of Chicago, 404 US 189 (1971), the argument that Mayer did not face imprisonment but only a fine: "Griffin does not represent a balance between the needs of the accused and the interest of

society; it's principle is a flat prohibition against pricing indigent Defendants out of as effective an appeal as would be available to others able to pay their own way." (at p. 196, 197).

In Mayer the Defendant received a fine of $500.00. In the present case, Mrs. Gillion lost the society of her two children for life. There is no need to elaborate or include citations concerning what it means to a parent to lose a child by such a judicial decision.

In the present case, the Court did not inquire as to the Petitioner's indigency although the Court did apparently advise her of her right to appeal within 30 days. (CL 93). No Notice of Appeal was timely filed although the Court appointed counsel was not paid for his services until several months later (CL 72) and hence, arguably was still

acting as appointed counsel for the Petitioner.[9] The Record is, of course, silent as to why an appeal was not timely filed and why no post trial motions (the Petition For Rehearing) were filed for over six months. What is clear is that the Petitioner was still indigent as of the April, 1974 Rehearing Proceedings. (R. 34-41, 5 April 1974). This, along with the fact that to pay her previously Court appointed counsel (R. 41, 5 April 1974) she had to take out a loan could lead one to infer that the reason why no Notice of Appeal was timely filed was that the Petitioner simply did not have

[9] An additional question exists - whether there was a due process violation to the Petitioner's right because her court-appointed counsel did not file a timely Notice of Appeal. See People v. Shockey, 25 Ill. 2d 528 (1963), dissenting Opinion of Justice Schaefer; reversed 375 US 22 in light of Douglas v. California, and ultimately reversed by the Ill. Sup. Ct. 30 Ill. 2d 147 (1964).

the funds to prosecute the appeal.

Given the serious nature of the sanctions involved in unfitness proceedings this Court should hold that there is a constitutional right to appointed counsel for indigents at the Trial Level of such proceedings and, where there is a right of first appeal, it is a denial of the equal protection clause for the State to deny effective access to the Appellate processees to indigent parents. Nor should it be any defense for the State to argue that such access to the Appellate Courts is financially irresponsible. As the Court pointed out in Mayer v. Chicago:

> "Arbitrary denial of Appellate review of proceedings of the State's lowest Trial Courts may save the State some dollars and cents but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice." Mayer v. Chicago, Supra., at p. 197, 198.

CONCLUSION

Because there is no rationable or reasonable basis for the State of Illinois to grant access to the Appellate Courts to non-indigent parents in unfitness proceedings while denying effective access to such courts to indigent parents, the Writ of Certiorari should issue to review the judgement and opinion of the Illinois Appellate Court, Third District.

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Mr. JUSTICE ALLOY delivered the opinion of the Court:

This is an appeal by Cynthia Workman, mother of William Workman and Robert Workman, minors, from the orders of the Circuit Court of Will County which terminated her parental rights and denied a subsequent "petition for rehearing."

The record discloses that the State of Illinois filed a petition on February 23, 1972 which alleged that the children, William Workman and Robert Workman, were neglected and should be made wards of the court (See: Ill. Rev. Stat., 1971, Ch. 37, Sec. 702-4, 704-1). Cynthia Workman and her husband Robert Workman were then in the process of getting a divorce and they consented to the temporary guardianship of the children. On June 2, 1972, the State filed a supplemental petition alleging that the mother

was unfit and requesting the appointment of a guardian with power to consent to adoption under the terms of section 704-1 (5) and 705-9 (3) of Chapter 37 and section 9.1-1, Ch. 4 of 1971 Ill. Rev. Stat. The written consent of the father, Robert Workman, was filed in such action.

Following the hearing on July 24, 1972, the trial court entered an order on April 5, 1973, finding Cynthia Workman unfit and terminating her parental rights. The minors were made wards of the court and a guardian was appointed with power to consent to adoption. It appears that both of the boys, who were 7 and 5 respectively at the time of the hearing, were placed in foster care during 1972 and have remained under such care.

Apparently no further action occurred until October 12, 1973, when Cynthia Workman filed what was labeled as a

"petition for rehearing". On the next day the trial court ordered an evidentiary hearing. On April 5, 1974, the trial court denied the petition and from that order and, assertedly, from the primary order a year earlier, Cynthia Workman has appealed to this Court.

There is no dispute as to the legal principles concerning the finding of unfitness of a parent other than as applied to the particular facts in the case before us. (See: In re Gibson (1975), 24 Ill. App. 3d 981, 322 N.E. 2d 225.) The State contends, however, that the notice of appeal in this case was filed far too late to allow us to consider the initial finding of unfitness. The order of the court was entered on April 5, 1973, and was clearly a final and appealable order, since it found Cynthia Workman to be unfit and terminated her

rights as to custody of the minors, Robert and William Workman. The adjudication of wardship made in that order was specifically described as a final judgement by the Juvenile Court Act (Ill. Rev. Stat., 1973, Ch. 37, 704-8 (3)). Nothing was done by appellant in the 30-day period following the entry of the order nor, in fact, for over 6 months thereafter, to question that judgement. Since there was no filing of a notice of appeal within 30 days of that judgement, or any other appropriate action such as a post-trial motion, it is clear that no appeal could be maintained from that judgement under the present procedure (Sup. Ct. Rule 303 ---1973 Ill. Rev. Stat., Ch. 110A, Sec. 303, cf. Deckard v. Joiner, 44 Ill. 2d 412, 416-417, 255 N.E. 2d 900; Egermaier v. Egermaier, 128 Ill. App. 2d 448, 451, 262 N.E. 2d 376).

The State, however, further contends that the court order denying appellant's "petition for rehearing" is not appealable because the petition was not filed within 30 days after entry of the April 5, 1973 order as required by statute. (Ill. Rev. Stat., 1973, Ch. 110, Sec. 68.3 (1)).We find, on analysis, however, that the petition filed herein was not the usual "petition for rehearing" contemplated by court rule. As clearly appears from the face of the petition and the type of evidence brought forth at the evidentiary hearing therein, the petition in fact sought a modification of the April 5, 1973 order by reason of a subsequent change in circumstances. A petition of this nature has been considered in other cases on appeal. In the case of In re Ramelow (1954), 3 Ill. App. 2d 190, 197, 121 N.E. 2d 141 (1954), the court allowed a peti-

tion for restoration of parental rights, after they had been taken away, in a proceeding similar to that in the instant case. The court in the Ramelow case there concluded that the parent could file for restoration of rights, on the ground of changed circumstances, at any time before a petition to adopt the child or children was filed. Similarly, in Oeth v. Erwin (1955), 6 Ill. App. 2d 18, 22, 23, the court also noted that a mother might petition for restoration of custodial rights by reason of a change in circumstances, even though a guardian had been appointed with power to consent to adoption. It is not clear that the courts have determined that an order could permanently deprive a parent of the right to petition for restoration of custodial rights prior to the filing of a petition to adopt a child or children under the

Statutes as they now appear (Ill. Rev. Stat., 1963, Ch. 4 Sec. 9.1-17 and Ch. 37, Sec. 705-9.1 et post).

We believe, however, that it is wise to be guided by prior cases considering this issue to which we have referred. The proceeding in this case was apparently treated by the trial court as a petition for restoration of custodial rights. It is notable that the court, in this case, expressly retained jurisdiction over the wards in order to consider such further procedures as, from time to time, might be found in accordance with equity and in accordance with statutes. Since the petition in this case alleged that appellant was entitled to regain her parental rights by reason of a change in circumstances occurring since the entry of the April 5, 1973 order (and apparently because no adoption petition was pending

as to the children), we find that there was no particular time limit within which the petition was required to be filed and that the appeal (timely taken) from the denial of that petition is properly before this court.

It is contended by appellant that the finding of the trial court was contrary to the manifest weight of the evidence. Viewing the evidence as a whole, we cannot say that the trial court was not within its discretion in denying the petition to regain parental rights and custody of the children, since the court did conclude that there was no significant evidence to show clearly that appellant has now become qualified to reacquire parental rights and the custody of the children, and that it is to the best interests of the children that she be given such rights. The trial court was

in best position to observe the petitioner, and to give consideration to the evidence as presented in the trial court. The record itself does not clearly show that the determination of the trial court was contrary to the manifest weight of the evidence.

On the basis of the record, therefore, and for the reasons stated, the appeal from the order of April 5, 1973, is dismissed and the order of the Will County Circuit Court dated April 5, 1974, is affirmed.

Appeal from order of April 5, 1973 is dismissed and Order of April 5, 1974 is affirmed.

Stengel, J. concurs.

MR. JUSTICE BARRY specially concurring:

I agree with the majority that the Petitioner is not entitled to the relief prayed but I reach this conclusion for different reasons and feel that I must comment upon the majority's assertion that there exists, following a final order terminating parental rights, some residual right of the natural parents to petition for restoration of custody.

The court in Ramelow reached the conclusion that there is a legal remedy vested in the natural parents of a child for restoration of custodial rights by reasons of changed circumstances following a previous final order terminating parental rights by construction of Ill. Rev. Stat., Ch. 23 Sec. 201 (1951) which has since been repealed and has never been reenacted by any parellel enactment. Instead I believe Ill. Rev. Stat., Ch. 37, Sec.

705-9 (1973) is now the controlling law, that an order terminating parental rights and empowering a guardian to consent to adoption "deprives the parents of the minor of all legal rights..." (Also see Ill. Rev. Stat., Ch. 37 Sec. 701-16 (1973)). When such an order terminating all parental rights (as opposed to a mere custody order) is allowed to become final by lack of appeal, there cannot exist a subsequent legal right to petition for restoration of custodial rights by reason of changed circumstances.

Oeth clearly and correctly defines that adoption and custody are entirely different things. In that case, the infant had been declared a neglected child and custody was given a guardian with power to consent to adoption but no finding had been made that the natural mother was unfit or had consented to

giving the guardian such power. In the absence of her consent or a finding of unfitness, the circuit court there was held to have been without jurisdiction to give the guardian the power to consent to an adoption, precisely because the order did not terminate the rights of the natural mother. Hence, because she had not been deprived of all parental rights by a valid prior order of court, she was entitled to petition for restoration of custody. Fortuitously the natural parent there learned of the adoption proceeding in some unknown way within 4 days after the guardian filed written consent.

The majority's recognition of a Right to Petition for Restoration of Custody following a final order terminating all parental rights here, will, in my judgement, seriously jeopardize the public policy and procedures established

by the Adoption Act.

Under that Act, it is the usual procedure where agencies are involved to place children for adoption after the parental rights of natural parents are terminated. The infant must then remain in the home of prospective unrelated adoptive parents for six months before a final adoption order can be entered. If this court recognizes in this context that following an order terminating the rights of the natural parents, there nonetheless exists some residual right in the natural parents to seek restoration of custody because of their changed circumstances while the infant was in the custody of prospective adoptive parents, several problems arise. Must the natural parents be made parties to the adoption petition to terminate this residual right of the natural parents? If so, is that

consistent with the scheme of the Adoption Act which attempts by impoundment of records, and other devices, to preclude the natural parents and adoptive parents from learning of each others' identity, except for good cause? It does not promote the State's interest in finding suitable adoptive homes to create a situation whereby prospective adoptive parents must live for months with uncertainty as to whether they can adopt.

In my opinion once all parental rights have been terminated by a final order, the natural parents can collaterally attack the validity of such order by Petition for Writ of Habeas Corpus, but the burden would not merely be one of showing that they have reformed. (People ex rel., Karr v. Weihe, 30 Ill. App. 2d 361, 172 N.E. 2d 897 (2nd Dist., 1976)). They may also petition for adoption

themselves, and if the court finds them now fit, the court can order its appointed guardian, even though antagonistic, to consent.

I would find that the circuit court order of April 5, 1973 was a final and appealable order and was not timely appealed; I would find the petition for rehearing filed October 12, 1973 not properly before the court and should have been dismissed.

48279

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

CLELL L. WOODS
CLERK

May 27, 1976

TELEPHONE
AREA CODE 217
782-2035

Appendix 2

Mr. Patrick T. Murphy
Attorney at Law
77 W. Washington Street
Chicago, Ill. 60602

No. 48279 - In the Interest of William and Robert Workman, petitioners. Leave to appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
Clell L. Woods
Clerk of the Supreme Court

Supreme Court, U. S.
FILED
DEC 14 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-259

Cynthia Gillion - - - - - - Petitioner,

- VS -

People of the
State of Illinois - - - - - Respondent.

BRIEF OPPOSING THE PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD DISTRICT.

JOSE M. NUNES
Assistant State's Attorney
Will County Courthouse
Joliet, Illinois 60431

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CASES:

New York, ex rel. Rosevale Realty Co. V. Kleinert (1925) 268 U.S. 646, 69 L.Ed. 1135, 45 S.Ct. 618.

Wilson V. Cook (1946) 327 U.S. 474, 90 L.Ed. 793, 66 S.Ct. 663.

STATUTES:

Ill. Rev. Stat., Ch. 37 Sec. 701-20 (1) (1975))

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Illinois Revised Statutes, Chapter 37 Section 701-20 (1) (1975))

> "...At the request of any party financially unable to employ counsel, the court shall appoint counsel."

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-259

Cynthia Gillion - - - - - - Petitioner,

- VS -

People of the
State of Illinois - - - - - Respondent.

REASONS FOR DENYING THE WRIT

In expressing his reasons for this court to grant the Writ of Certiorari, the Petitioner presents for review the following questions:

> Whether the due process and equal protection clauses require the States to
>
> 1. Insure that indigent parents are entitled to appointment of counsel at parental termination proceedings, and
>
> 2. (Insure) that the record of such hearing affirmatively reflect that a parent is fully advised of
>
> (a) (his or) her right to seek appellate review of the final judicial termination of (his or) her parental rights, and
>
> (b) (if indigent, his or) her right to the assistance of counsel and a free transcript on appeal.

(Emphasis and outlining ours).

Based on the fact that the Illinois Statutes in question (Chapter

37 Section 701-20 (1) (1975)) provide that "...At the request of any party financially unable to employ counsel, the court shall appoint counsel." question number one (1) is not at issue.

In considering part (a) of question number two (2), the transcript of proceedings of the present case in the trial court disclosed (P103) that the Petitioner in the presence of her court appointed counsel was duly advised by the court "...this is a final order. It's an appealable order, the one you can appeal from. You have 30 days in which to file your appeal."

Clearly, part (a) of question two (2) is not at issue.

Remaining is part (b) of question two (2) outlined as follows:

> Whether the due process and equal protection clauses require the States to insure that the record of such hearing affirmatively reflect that

> a parent, if indigent, is fully advised of his or her rights to the assistance of counsel and a free transcript on appeal.

This question was not presented to the State Courts nor decided by the State's Highest Court. It simply was never raised.

We contend that this question should have been raised in the State Courts and failure to raise it deprived the Federal Supreme Court of jurisdiction.

> "It is well settled that the Federal Supreme Court is without jurisdiction to review the judgment of a State Court on a Writ of Certiorari by reason of a Federal question which was not raised below, or called to the attention of, or decided by, the State Court." New York, ex rel. Rosevale Realty Co. V. Kleinert (1925) 268 U.S. 646, 69 L. Ed. 1135, 45 S. Ct. 618.

> "The purpose of this (jurisdictional) requirement is to restrict our mandatory jurisdiction on appeal, (citations) and to make certain that no

judgment of a State Court will be reviewed on appeal by this court unless the highest court of the State has first been apprised that State Statute is being assailed as invalid on Federal grounds, (citations) or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it. (citations) This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the State Statute, as construed and applied, has either been presented for decision to the highest court of the State, (citations) or has in fact been decided by it, (citations) and that its decision was necessary to the judgment, (citations)." Wilson V. Cook (1946) 327 U.S. 474, 90 L.Ed. 793, 66 S.Ct. 663.

CONCLUSION

Because this question was not raised below, we respectfully submit to this court that the Writ of Certiorari should be denied.

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Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76 - 259

Cynthia Gillion - - - - - - - - - - Petitioner,

- vs -

People of the
State of Illinois - - - - - - - - - Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

PATRICK T. MURPHY
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Suite 2300
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76 - 259

Cynthia Gillion - - - - - - - - - Petitioner,

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People of the
State of Illinois - - - - - - - - Respondent.

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CASES:

Boykin v. Alabama, 395 U.S. 238,241 (1969) 3

Duignan v. U.S., 274 U.S. 195, 200 (1927) 2

Gila Valley Ry. v. Hall, 232 U.S. 94 (1914) 2

Kennedy v. Mendoza - Martinez, 362 U.S. 144, 167, 168 (1963) 7

Mayer v. Chicago, 404 U.S. 189 (1971) 11

People v. Shockey, Dissenting Opinion of Justice Schaefer, 25 Ill. 2d 528 (1963) 3, 6, 10

Pollard v. U.S., 352 U.S. 354, 359 (1957) 3

Shockey v. Illinois, 375 U.S. 22 3

Stromberg v. California, 283 U.S. 359 (1931) 3

Terminello v. Chicago, 337 U.S. 1 (1949) 3

U.S. v. Tennessee and Coosa Rd., 176 U.S. 242, 256 (1899) 3

STATUTES

Ill. Rev. Stat., Ch. 37, §701-20 8

Ill. Rev. Stat., Ch. 38, §122 8, 9

Ill. Rev. Stat., Ch. 110 §72 9

Ill. Rev. Stat., Ch. 110 §72.3 9

Ill. Rev. Stat., Ch. 110A, §605 11

45 A.L.R. 2d 552 10

INTRODUCTION

The Brief in opposition to the Petitioner's Petition for Certiorari argues that since the issue raised in the Petition for Certiorari was not properly raised in the State Courts, "it deprived the Federal Supreme Court of jurisdiction." (Page 4, Respondent's Brief in Opposition).*[1]

Since the Supreme Court of Illinois denied the Petition for Leave to Appeal without comment (Appendix 2 of Petition for a Writ of Certiorari), Respondent does have grounds to argue that the issue was never considered by the State Courts.

[1] * The Brief in Opposition does leave the improper inference that the question was never raised in the Supreme Court of Illinois. It was pointed out in the Petition for a Writ of Certiorari (at Pages 17-18), that the constitutional question was not raised before the Trial Court or before the Illinois Appellate Court. The issue was presented to the Supreme Court of Illinois in her Petition for Leave to Appeal. That Petition was denied by the Supreme Court of Illinois.

This Court's policy toward jurisdiction was well pointed out in Gila Valley Ry. v. Hall, 232 U.S. 94 (1914):

> "It is inadmissible for this Court to consider errors not fundamental in their character, which might have been, but were not, brought under Appellate Review in the Appellate Courts below." At Page 98. See also Duignan v. U.S., 274 U.S. 195, 200 (1927).

(1) The issue here presents a fundamental constitutional question readily apparent in the record which the Illinois Appellate Court reviewed and which issue it must have considered in reaching the decision it did. (2) Moreover, because of the unique circumstances of this case, the issue never had an opportunity to be adequately presented to the Trial Court or the Illinois Appellate Court.

1. The issue presented to this Court is fundamental in nature and was plain error so apparent in the Common Law Record that the Illinois Appellate Court must have considered it before reaching its decision.

This Court has granted Certiorari in cases where the issues were not presented nor considered by the Appellate Tribunals below but where the error had been fundamental in character. These cases include ones (a) where the issue was plain error and should have been apparent to the Court below. U.S. v. Tennessee and Coosa Rd., 176 U.S. 242, 256 (1899); Boykin v. Alabama, 395 U.S. 238, 241 (1969) and apparently also Shockey v. Illinois, 375 U.S. 22; See also People v. Shockey Dissenting Opinion of Justice Schaefer, 25 Ill. 2d 528 (1963); (b) where an indigent Defendant in a criminal case had not been represented by Counsel in his Petitions below nor in the filing of his original Petition for Certiorari, Pollard v. U.S., 352 U.S. 354, 359 (1957); and (c) when this Court has held that the lower Courts of necessity must have considered the narrower issue while ruling on the constitutionality of the broader statute. Terminello v. Chicago, 337 U.S. 1 (1949); Stromberg v. California, 283 U.S. 359

(1931).

Though the Petitioner's Attorney never filed Transcripts of Record in the Appellate Court (See ftnte. 2, Page 8 of the Petition for a Writ of Certiorari), the Common Law Record was available to the Appellate Court and the issue here was not only obvious from that record to the Appellate Court, but, indeed, the Court must have had to consider, at least in passing, the issue in order to reach the decision it ultimately did.

From the Common Law Record it was apparent:

1. Petitioner was found to be indigent and received an appointed Counsel for her Trial.

2. After the finding of unfitness, the Trial Court below informed Petitioner's Counsel and Petitioner that she had thirty (30) days in which to file an appeal from the date of the finding of unfitness. (See

Page 12, Petition for Certiorari, ftnte. 4).

3. No Notice of Appeal was filed for over one year after the unfitness finding.

4. Petitioner's Counsel received a Court Order for payment by the Court several months after the finding of unfitness. (See page 13, Petition for Certiorari) and hence arguably was still acting as appointed Counsel for her immediately after the finding of unfitness.

5. Petitioner's previously appointed Counsel ultimately represented the Petitioner as her retained Counsel on the Petition for Rehearing and on the appeal before the Appellate Court.

If the Transcripts were available to the Illinois Appellate Court, it could have determined that the Petitioner was apparently still indigent (although she had taken out a loan by which she paid her then retained Counsel) as of the Petition

for Rehearing. (At Page 29, Petition for Certiorari).

The Illinois Appellate Court, was unanimous in holding that the Notice of Appeal had not been filed in a timely fashion. Hence, it refused to review the records of the unfitness proceedings. However, in so ruling it had to review the Common Law Record which made clear the fact that neither the Court nor the appointed Counsel had ever, after the unfitness proceedings, inquired concerning the Petitioner's indigency. Moreover, there was no inquiry as to whether she needed some type of legal assistance to prosecute an appeal. The clear inferences from the record are that the reason that no legal action was taken for over six (6) months after the finding of unfitness was because the Petitioner simply did not have the funds to prosecute her case.

Mr. Justice Schaefer writing a dissenting Opinion in People v. Shockey, Supra, pointed out the nature of plain error in this type of case:

"To me the important question, which lies just beneath the surface of the Opinion of the (Illinois Supreme) Court, is whether or not did the Defendant receive competent representation by the Attorney that the State of Illinois appointed to represent him when that Attorney has, by his failure to take a simple procedural step, forever barred the Defendant's right to the ordinary full Appellate Review of the Trial at which he was convicted.

If we look only at the date of the Judgment of the Conviction, and at the date when the report of proceedings was filed, the conclusion follows automatically that it was not filed within the time prescribed by (Supreme Court Rules)---." (25 Ill. 2d 528, 531 (1963).

Although Shockey was a criminal case, the ultimate issue to be reviewed by this Court is whether the nature of the sanctions imposed against the Petitioner -(the permanent loss of the custody of her children) is in the nature of punitive sanctions and, hence requires at least some of the procedural safeguards of a criminal proceeding. Kennedy v. Mendoza - Martinez, 372 U.S. 144, 167, 168 (1963).

2. Because of the unique nature of the facts in this case the issue presented to this Court could not have been brought under review by either the Trial Court or the Illinois Appellate Court except by means of the Plain Error Doctrine.

The Petitioner, an indigent and unsophisticated woman, was appointed Counsel for the unfitness proceeding. This was done pursuant to Illinois Law. Ill. Rev. Stat. Ch. 37, §701-20. Her appointed Counsel never raised the issue of whether she was entitled to assistance on appeal nor did the Trial Court offer her any. Her appointed Counsel later became retained Counsel and neither as appointed nor retained counsel did he move an in expeditious fashion to protect the appellate rights of the Petitioner.

By the time the Petitioner, discovered the late filing of the Notice of Appeal, 31 December 1975, it was too late to raise the issue in any fashion. Although her punishment was great, the post conviction remedy statute is not available to "civil" litigants in Illinois. Ill. Rev. Stat.

Ch. 38, §122 (1973). Indeed, by expressed statutory provision the only manner in which a civil litigant can seek relief from a final order "after thirty (30) days from the entry thereof" is through Section 72 of the Illinois Civil Practice Act. (Ill. Rev. Stat. Ch. 110 §72 (1973)). However, this Petition must be filed "not later than two years after the entry of the Order, Judgment or Decree." (Ill. Rev. Stat. Ch. 110, §72.3 (1973)). When the Illinois Appellate Court reached its decision in December of 1975, over two years and eight (8) months had elapsed since the Judgment complained of.*[2]

[2] * The majority opinion of the Illinois Appellate Court below indicates that a parent may file something called a Petition for Restoration of Custodial Rights while the minority claims that "the natural parents can colaterally attack the validity of (an unfitness finding) by a Petition for Writ of Habeas Corpus, but the burden would not be merely one of showing that they have reformed. Opinion of Illinois Appellate Court, See Appendix 1, Page 14 (emphasis added).

However, the problem with this procedure, as the underlined portions above point out, and as the Illinois Appellate Court ultimately ruled

The only real avenue, therefore, open to the Petitioner was to sue her Attorney for malpractice. 45 A.L.R. 2d 552 and cases cited therein. See also dissenting opinion of Mr. Justice Schaefer, People v. Shockey, Supra. The irony in this situation is that a million dollar malpractice judgment would not bring the Petitioner's children back to her. However, if she received a one dollar fine or a conditional discharge in a criminal case, she would have been entitled, in Illinois, to a free transcript of

2
* (cont) (albeit without the assistance of a transcript of proceedings) is that the Petitioner must somehow show that she has reformed between the finding of unfitness and the bringing of the new action. As would have been shown in the transcript of the proceedings of the Petition for Rehearing, the entire thrust of the proceeding was whether or not the Petitioner at that time (as of the Petition for Rehearing) was reformed - that is, had enough money adequately to care for her youngsters. (See Page 14, Petition for Certiorari). It is indeed difficult to demonstrate that one has reformed if, indeed, one was not unfit in the first place. And the Petitioner contends that she was convicted of unfitness on the flimsiest evidence possible. (See Pages 7-12, Petition for Certiorari).

the proceedings and appointed Counsel on appeal. Mayer v. Chicago, 404 U.S. 189 (1971), Ill. Rev. Stat. Ch. 110A, §605 (1973).

Therefore, after receiving the decision of the Illinois Appellate Court, Third District, the only practicable avenue open to the Petitioner was the one she took, seeking new Counsel and Leave to Appeal in the Supreme Court of Illinois raising the issue before that Tribunal which she subsequently raised before this Tribunal.

CONCLUSION

Because the issues presented in the Petition for a Writ of Certiorari were of such a clear, fundamental and obvious nature both to the Trial Court and to the Illinois Appellate Court previously, because the issue was subsequently raised before the Supreme Court of Illinois and because the Petitioner is without a practicable way of effectually raising the issue in any other fashion, this Court should exercise its

jurisdiction and grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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